IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WAUSAU UNDERWRITERS INSURANCE COMPANY, as subrogee of HALPERN AND COMPANY, INC. and GREEN CIRCUITS, INC.	:	CIVIL ACTION
v.	:	
WILLIAM SHISLER and MYERS MAINTENANCE CORP.	:	NO. 98-5145

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J. February 24, 2000

Presently before the Court are Defendant William Shisler's ("Defendant") Motion for Summary Judgment (Docket No. 34), the response thereto of Plaintiff Wausau Underwriters Insurance's ("Plaintiff"), as subrogee of Halpern and Company, Inc. ("Halpern") and Green Circuits, Inc. ("Green") (Docket No. 38), and Defendant's reply brief (Docket No. 42). Also before the Court are Defendant's Motion to Compel (Docket No. 28) and Plaintiff's response thereto (Docket No. 29). For the reasons stated hereafter, Defendant's Motion for Summary Judgment is **GRANTED** and his Motion to Compel is **DENIED as moot**.

I. BACKGROUND

On December 3, 1997, a fire occurred at a facility owned by Halpern and leased to Green (the "Green facility" or the "Green/Halpern building"), which is located at 1260 North 31st

Street, Philadelphia, Pennsylvania. Adjacent to the Green facility is another building owned by Halpern (the "Halpern building"). The fire caused damage to the real and personal property of Halpern and Green. On September 28, 1998, Plaintiff, as subrogee of Halpern and Green Circuits filed a Complaint against Defendant.

Plaintiff provided first party insurance coverage for Halpern and Green for damages sustained in the fire. Under the terms of the insurance policy, Plaintiff paid money to Halpern and Green for losses sustained as a result of the fire. By payment of insurance proceeds to Green and/or Halpern, Plaintiff Wausau became subrogated to the rights of Green and Halpern to recover its losses from a potentially responsible third-party, i.e., someone other than Green and Halpern. The damage sustained by Halpern and Green was allegedly caused by Defendant’s negligence and breach of contract.

In November 1997, Green's employee and second shift supervisor, Nathan Schwartzberg ("Schwartzberg"), left Green's employ. Steve Halpern, ("Mr. Halpern"), Green's owner, contacted William R. Myers ("Mr. Myers"), Myers Maintenance Corporation's ("Myers") owner, to find a substitute for Schwartzberg. Mr. Myers spoke to his employee, Defendant, about Mr. Halpern's request. Defendant ultimately worked as Green's second shift supervisor from November 1997 to December 1997 pursuant to an agreement reached by Mr. Halpern and Mr. Myers. Defendant previously performed

mechanical installation work for Green.

Before he became the second shift supervisor at Green pursuant to Mr. Halpern and Mr. Myers' agreement, Peter Jansson ("Jansson), Green's employee, and Mr. Halpern trained Defendant to oversee Green's business, copper reclamation, and its second shift employees. Defendant received training on issues concerning, inter alia, the storage in cardboard boxes of the heated cooper produced by the reclamation process, where to store the day's production at the end of the second shift, and the "shut-down" process for the Green facility as the there was no third shift that operated between the start of Green's first shift and the end of Green's second shift. At the end of his training, defendant ran Green Circuit's second shift by himself.

In November 1997, Green was experimenting with smelting techniques so as to produce a purer copper product. Green's experiments on December 2, 1997, included heating impure copper at temperatures ranging from 400 to 900 degrees Fahrenheit. After the experiments were performed, the heated copper, still ranging in temperature between 400 and 900 degrees Fahrenheit, was placed directly in cardboard boxes. The cardboard boxes were wood reinforced and were not flame retardant or fire proof. At night, the cardboard boxes that held the heated copper were stored inside a Green/Halpern building to prevent theft although Mr. Halpern was aware that the heated copper had previously charred the cardboard

boxes and that his buildings did not have fire detection or fire remediation systems.

On December 2, 1997, Defendant arrived at Green's facility at 3:30 PM and smelled smoke. Defendant and Jansson discovered that one of the boxes of copper produced by the first shift had charred. The three other boxes produced by the first shift were inspected by Jansson and exhibited no signs of charring. The charred box was moved to another part of the Green building and hosed-down at Jansson's direction. The three remaining non-charred boxes were also moved. At the time Jansson left the Green facility, he neither established a fire watch nor contacted the fire department.

The charred box was periodically watered down during Defendant's shift. The other three boxes of heated copper produced by the first shift were never observed as charred or as radiating heat. They were later moved to another location inside the Green facility as they obstructed the operation of Green's forklift. However, Defendant neither moved the boxes nor directed that they be moved from where Jansson originally placed them. Defendant left the Green building at 11:21 PM after he shutdown the copper reclamation process and inspected the Green facility. When he left the Green facility, he neither saw nor smelled smoke. Moreover, no second shift employee reported to him that he or she observed fire or smoke. After the Green building was secured, the second shift employees walked to the Halpern building and showered. After they

showered and clocked-out at midnight, Shisler locked-up the Halpern building and set its burglar alarm. At that time, neither Defendant nor the second shift employees detected smoke or fire at the Green facility. In the early morning of December 3, 1997, the Green building burned beyond repair. After the fire, it was discovered that the box that had charred on December 2, 1997, did not burn. The other three boxes produced by the first shift, however, burned and were completely destroyed.

After the fire, Plaintiff payed Green and Halpern for their insured losses. Thereafter, Plaintiff instituted the instant lawsuit against Defendant pursuant to its right of subrogation. After much procedural wrangling by both parties, Defendant filed the instant Motion for Summary Judgment.

II. LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. When the moving party does not bear the burden of persuasion at trial, as is the case here, its burden "may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party "may not rest upon the mere allegations or denials of the [nonmoving] party's pleading," id., but must support its response with affidavits, depositions, answers to interrogatories, or admissions on file. See Celotex, 477 U.S. at 324; Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990).

To determine whether summary judgment is appropriate, the Court must determine whether any genuine issue of material fact exists. An issue is "material" only if the dispute "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). An issue is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. If the

evidence favoring the nonmoving party is "merely colorable," "not significantly probative," or amounts to only a "scintilla," summary judgment may be granted. See id. at 249-50, 252; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)). Of course, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson, 477 U.S. at 255; see also Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255; see also Big Apple BMW, 974 F.2d at 1363. Thus, the Court's inquiry at the summary judgment stage is only the "threshold inquiry of determining whether there is the need for a trial," that is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250-52.

III. DISCUSSION

A. Motion for Summary Judgment

Plaintiff states two causes of action against Defendant:

negligence and breach of contract. Defendant's instant Motion, however, fails to directly address Plaintiff's causes of action. Instead, Defendant argues that while he was acting as the second shift supervisor for Green, he was under Green's direction and control and therefore was an employee of Green under the borrowed servant doctrine. Defendant further argues that because he was Green's employee under the borrowed servant doctrine, Plaintiff has no subrogation right against him.

It is well-settled that an employer may sue its employee for negligence or breach of contract. Indeed, such lawsuits are frequently filed in courts throughout the United States. It is also well-settled that once an insurer pays a claim to its insured, it may then stand in the shoes of the insured and assert the insured's rights against a tortfeasor. The right of an insurer to sue a third-party in the shadow of the insured's rights is called subrogation. An insurer, however, may not assert a subrogation claim against its own insured.

Defendant argues that the "anti-subrogation" rule is applicable to Plaintiff's lawsuit and he is therefore immune from suit. Defendant's argument is predicated on an assumption that is not supported by the record--that he is an insured under the insurance contract executed by Plaintiff and Halpern.\[1]

Plaintiff's argument for subrogation is equally flawed,

[1] The Court notes that while the parties operate under the assumption that Green was an insured under the insurance contract executed by Halpern and Plaintiff, the Court cannot locate the provision of the insurance contract that includes Green as an insured.

however. Plaintiff argues that Defendant "cannot claim status as an additional insured for liability purposes under the Wausau policy issued to Halpern and Green." (Pl.'s Ans. to Def.'s Mot. for Summ. J. at 11). As Defendant deftly discusses, however, Plaintiff's argument is misguided as it relies on the Commercial General Liability Insurance Part ("GCL") of Halpern's insurance contract. The GCL part of Halpern's policy insures against third-party liability claims. The monies paid by Wasau to Green and Halpern, however, were paid under the Personal Property Insurance part of the Wasau policy. Therefore, the GCL is not germane as this law suit does not involve third party liability claims asserted against Green and Halpern.

Defendant argues that the Personal Property Insurance Policy "covers all damages to the covered party . . . regardless of whether the damage was caused by the insureds' employees or by any outside source."\[2] (Def.'s Reply Brief at 14). The truth in Defendant's statement is evidenced by the fact that Plaintiff paid for Green and Halpern's property loss.\[3] Nevertheless, this case

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[2] Defendant refers the Court to Exhibit O of Defendant's Motion for Summary Judgment. Defendant does not provide any other citation to guide the Court to the specific page and section of the policy which supports his argument. Moreover, Exhibit O, includes over 100 pages long, many of which are out of sequence. Nevertheless,

[3] Indeed, the Building and Personal Property Coverage policy states that Wasau "will pay [the Named Insured] for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Damage." (Def.s Mot. for Summ. J., Ex. O, Building and Personal Property Coverage Form, at 1). Halpern, as the Named Insured, was paid for the direct physical loss to Covered Property caused by or resulting from fire, a Covered Loss but such payment does not protect Defendant from suit under anti-subrogation principles. (See Def.s Mot. for Summ. J., Ex. O, Building and Personal Property Coverage Form, at 1 and Causes of Loss--Special Form at 10, § F).

does not concern whether Halpern's loss was covered. Rather, it concerns whether Plaintiff may subrogate against Defendant and whether Defendant may be liable under the negligence and breach of contract theories of recovery. As the Court finds unpersuasive Defendant's anti-subrogation argument, it now considers whether Defendant is entitled to summary judgment on Plaintiff's negligence and breach of contract claims.

1. Negligence

The elements of a negligence cause of action under Pennsylvania law are familiar: (1) a duty on the part of the defendant to conform to a certain standard of conduct with respect to the plaintiff; (2) a breach of that duty by the defendant; (3) a reasonably close causal connection between the conduct of the defendant and the resulting injury to the plaintiff; and (4) actual loss or damage to the plaintiff's interest. See Alumni Ass'n Delta Zeta Zeta of Lamda Chi Alpha Fraternity v. Sullivan, 535 A.2d 1095 (Pa. Super. Ct. 1987). Plaintiff alleges that the fire and resulting damages suffered by Halpern were caused by Defendant's carelessness and negligence with regard to the following: (1) his storage and oversight of the cardboard boxes which contained heated copper and which he allegedly knew had a propensity to combust; (2) his stopping production and exiting Halpern's facility, with the employees he supervised, before the scheduled end of the second shift; and (3) his failure to post a fire watch over the cardboard boxes which contained heated copper. (See Compl. at ¶ 11).

Defendant argues that he did not violate any duty owed to Halpern. Indeed, he argues that when he stored the heated copper inside the Green facility on the evening of December 2, 1997, he expressly complied with his obligation and duties as second shift supervisor. That is, Defendant argues that he was expressly instructed by Jansson to store the cardboard boxes of heated copper inside Halpern's building. Indeed, Jansson's deposition testimony confirms that he instructed Defendant to store all cardboard boxes containing heated copper inside a Halpern/Green building. Therefore, the record before the Court indicates that Defendant had a duty to store the boxes of heated copper inside a Halpern/Green building and he fulfilled said duty to Green when he stored the boxes in a Halpern/Green building.

The Court also finds that it was not foreseeable that the Green building would catch fire at any time on December 3, 1997. Accordingly, because Defendant could not have reasonably foreseen that a fire would start at some time after he left the Halpern premises, he had no obligation to establish a fire watch. Finally, that Defendant allegedly left the Green facility and went to the Halpern building before the end of his shift does not constitute negligence under Pennsylvania law. Thus, the Court finds that Plaintiff's allegations do not establish a reasonably close causal connection between Defendant's conduct and the resulting fire. Therefore, Defendant is granted summary judgment with regard to Plaintiff's negligence claim as no genuine issues of material fact exist.

2. Breach of contract

The elements of a breach of contract cause of action are well settled. To prove a breach of contract under Pennsylvania law, a plaintiff must show: (1) the existence of a valid and binding contract to which the plaintiff and defendants were parties; (2) the contract's essential terms; (3) that plaintiff complied with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) damages resulting from the breach. See Gundlach v. Reinstein, 924 F. Supp. 684, 688 (E.D. Pa. 1996) (listing elements required in breach of contract case between university and student), aff'd without op., 114 F.3d 1172 (3d Cir. 1997).

Plaintiff alleges that Defendant breached his contract with Green when he failed to perform his duties as the second shift supervisor in a good, safe, and workmanlike manner and that such failure proximately causes the fire that damaged Green's property. (See Pl's Amend. Compl at ¶¶ 17-18). Plaintiff alleges that Green contracted with Myers for Defendant, Myers' employee, to be the second shift supervisor for Green. (See Pl.'s Amend. Compl. at ¶ 8 (stating that "[p]rior to and as of December 3, 1997, Green had contracted with Myers for Myers' employee, defendant Shisler, to supervise Green's second shift operations at the facility on a temporary basis.")). Plaintiff does not allege that Green had a contract with Defendant. The Court is cognizant that when considering a summary judgment motion, it "must accept as true the facts alleged in the complaint and all reasonable inferences that

can be drawn from them." Markowitz, 906 F.2d at 103. Because the facts in the Complaint do not allege that a Defendant had a contract with Halpern or Green and the reasonable inference is that Plaintiff had a contract with Myers only, Plaintiff's breach of contract claim must fail for lack of privity. Accordingly, Defendant's Motion for Summary Judgment is granted with regard to Plaintiff's breach of contract action.

B. Motion to Compel

As the Court determined that no issues of material fact exist as to Plaintiff's claims against Defendant and that Defendant is entitled to summary judgment, Defendant's Motion to Compel is moot.

This Court’s Final Judgment follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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v.	:	
WILLIAM SHISLER and MYERS MAINTENANCE CORP.	:	NO. 98-5145

FINAL JUDGMENT

AND NOW, this 24th day of February, 2000, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 34), Plaintiff's response thereto (Docket No. 38), Defendant's reply brief (Docket No. 42), Defendant's Motion to Compel (Docket No. 28) and Plaintiff's response thereto (Docket No. 29) IT IS HEREBY ORDERED that:

(1) Defendant’s Motion for Summary Judgment is **GRANTED;**

(2) Defendant's Motion to Compel is **DENIED as moot.**

BY THE COURT:

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HERBERT J. HUTTON, J.